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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-817

ETTA B. ROSS, *Petitioner,*

v.

JAMES W. ROSS, JR., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

Petitioner, Etta B. Ross, respectfully requests this Court to issue a writ of certiorari to the Appeals Court of Massachusetts to review its judgment in the above-captioned case.

CITATION TO OPINIONS BELOW

The order of the Supreme Judicial Court of Massachusetts, dated October 1, 1974, denying review, is not officially reported, but is set out in Appendix A, *infra,* at 1a.

The opinion of the Appeals Court of Massachusetts, Middlesex County, released August 8, 1974, is officially reported as *Ross* v. *Ross*, Mass. App. Ct. Adv. Sh. ——, 314 N.E.2d 888 (1974), and set out in Appendix A, *infra*, at 1a-14a.

The final decree of the Probate Court, County of Middlesex, dated November 23, 1971, is not officially reported, but is set out in Appendix A, *infra*, at 14a. The Report of Material Facts by the Probate Court, filed October 5, 1972, also appears in Appendix A, *infra*, at 16a-22a.

The order of the Probate Court, dated November 18, 1974 staying entry of final judgment pending this appeal is set out in Appendix A, *infra*, at 22a.

JURISDICTION

The order of the Supreme Judicial Court of Massachusetts, denying review, was issued and filed October 1, 1974. (App. A at 1a). No request was made for rehearing in that court.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) to review the judgment of the Appeals Court of Massachusetts which deprived Etta B. Ross of the equal protection of the laws in violation of the Fourteenth Amendment.

QUESTION PRESENTED FOR REVIEW

Whether Etta B. Ross was denied equal protection by a discriminatory presumption applied by the Appeals Court that a married person who pays for property placed in the other spouse's name is giving that property away, but that no gift is intended in an indistinguishable case of unmarried persons.

STATEMENT OF THE CASE

I. Proceedings Below

This case began as a civil action in equity by Etta Ross against her former husband, James Ross, to determine title to certain real and personal property. The case assumed federal constitutional proportions when the Appeals Court of Massachusetts applied an invidiously discriminatory presumption of law which arbitrarily singles out married persons for irrational treatment in connection with the acquisition of property interests by one party who places title in the name of the other.

The original equity petition filed by Etta Ross was dated April 15, 1970. A substituted equity petition, dated May 25, 1971, was subsequently filed and allowed.

The final decree of the Probate Court, Middlesex County, Massachusetts, was entered November 23, 1971. (App. A at 14a), granting to Etta Ross virtually all of the requested relief.

On intermediate appeal, the Appeals Court of Massachusetts reversed. *Ross* v. *Ross*, Mass. App. Ct. ——, 314 N.E.2d 888 (1974), App. A, *infra*, at 1a-14a. Rehearing was denied.

The Supreme Judicial Court of Massachusetts denied further review on October 1, 1974. *Ross* v. *Ross*, No. 191M (Mass. Sup. Jud. Ct., Oct. 1, 1974).

This petition for certiorari followed.

II. Facts

Etta and James Ross were married on March 9, 1950. They had a daughter on May 10, 1951, their only child. In 1954 they moved to Madison, Wisconsin, where

James Ross was a graduate student. Etta Ross became a broker in both California (1948) and Madison and earned income from commissions and capital gains.

In 1957 Etta and James Ross left Madison and moved to Boston. She then had approximately $14,500.00 of her own money, and he had none. (App. A at 4a, 20a). She also had furnishings, realty, and securities.

After moving to Boston, James Ross became an assistant professor at M.I.T. He held that position until June 30, 1962, when he lost his job. (App. A at 16a). Bank records showed that his net monthly salary at M.I.T. in 1962 was $494.01. (R. v.I, p. 95). James Ross freely admitted that his salary was not sufficient to cover the household expenses and support of Etta Ross and their daughter.[1] (R. v.I, pp. 19-21). Necessities which were not covered by his salary, and matters beyond necessities were acquired by virtue of income Etta Ross generated in real estate and other investments.

Between January and July, 1962, Etta Ross deposited $23,339.20 in a joint account to which she and James Ross were signatories. (App. A at 16a). There was no claim that she was giving this away.

On August 1, 1962, $500 from the joint account was used to purchase 500 shares of stock in Orion Research, Inc., the ownership of which is disputed in this case. The trial court found that

> ". . . the $500.00 withdrawn from the joint checking account to pay the original five hundred shares of Orion Research Inc. was her [Etta Ross'] money and that the shares of stock were taken in

[1] *See* Report of Material Facts, App. A at 16a.

> her husband's name solely for the purpose of giving him leverage with the company. . . . that it was the intention of the parties that these shares of stock and other shares of stock similarly purchased were to be the sole property of the petitioner [Etta Ross]. That no gift was intended, but the intention of the parties was that the shares of stock were put in the respondent's names [James Ross], particularly shares of Orion Research Inc., merely to give him a standing with the company." (App. A at 17a).

Nonetheless, the Appeals Court, applying the constitutionally suspect presumption at issue here, ruled that Etta Ross was giving away the $500 forever and stock purchased with it when she allowed the stock to be put in James Ross' name. This result was reached solely because the parties were married. A contrary conclusion would have been reached had they not been married. (App. A at 7a, 11a-12a).

Other securities, real and personal property were also the subject of disputed ownership, and application of the discriminatory common law presumption in question. Indeed, the total value of all of the property in question could possibly exceed several hundreds of thousands of dollars.

Etta Ross deposited $9,612.13 in the joint checking account between February and May, 1964. (App. A at 17a). These sums, the trial court found, "were all earned by her and her own money." *Id.* James Ross made no deposits during that time. *Id.*

In June, 1964, another $500 check from the joint account was used to acquire a further 500 shares of Orion Research Inc. The trial court again found that "they were purchased with the same understanding

. . . that they were in his name only, but because her money paid for them that they were her shares of stock." (App. A at 17a).

The Appeals Court once more reversed, applying the discriminatory presumption in question, and holding that Etta Ross had in law been giving away the $500 she had earned and the stock purchased with it, solely because she and James Ross were married. (App. A at 13a).

Between January and July, 1967, Etta Ross deposited $208,144.64 from the sale of certain Cambridge property and securities. She gave James Ross $4,157 in March 1967 to buy more Orion shares under the same arrangement. (App. A at 13a, 18a). These sums had been obtained by her pledging a savings bank passbook in her own name, and, accordingly, both lower courts found the 127 shares of Orion so acquired to belong to Etta Ross. *Id.*

Another 2502 ⅔ shares, however, purchased with funds from the joint account, were held to be the sole property of James Ross. (App. A at 13a). Although the trial court had found that necessities exhausted James Ross' limited income (App. A at 16a-17a) and that he "contributed nothing" to the share acquisition (*Id.* at 18a), the Appeals Court insistently applied the discriminatory presumption that Etta Ross was giving away the money she had worked for to her husband, solely because they were married.

In all, over 68,000 shares of Orion stock were disputed. The trial court found that these had been purchased by funds from Etta Ross' earnings, that she was not giving away the funds or stocks to her husband, that he held title for leverage with the com-

pany, and that accordingly, Etta Ross had a valid claim of ownership. The Appeals Court took the stock away from Etta Ross by the device of a common law presumption which is irrational and arbitrary.

Shares of bank stock in the Cambridge Trust Co. (App. A at 7a, 8a, 21a), art works and household furnishings (App. A at 10a, 21a), and the family home at 61 Gatehouse Road in Newton, Massachusetts, were also taken away from Etta Ross in part because she had placed title in both her and James Ross' names. While the trial court acknowledged her right to own that which she paid for with her own money, the Appeals Court continued to give away real and personal property that included James Ross as a titleholder.

III. When and How the Federal Questions Were Raised and Decided Below

The problem of unconstitutional discrimination was first introduced by the Appeals Court in its opinion. That court had stated the general common law rule of the case as follows:

> ". . . [W]here one provides the entire purchase price for property but causes title to be transferred to another, a presumption arises that the latter holds the property on a resulting trust for the one who provided the entire purchase price." *Ross* v. *Ross, supra,* 314 N.E.2d at 893; App. A at 7a.

If this rule had been applied even-handedly, the trial court judgment would have been affirmed. However, the Appeals Court carved out an exception, which petitioner contends is arbitrary, for such transfers between spouses:

> "This rule is subject to the exception that where a husband or wife . . . [citations omitted] provides

> the entire purchase price and causes title to be put in the spouse's name, a contrary presumption arises, namely, that a gift to the spouse is intended." *Id.*

As a common law rule the exception is subject to the same constitutional restraints as would be an identical statutory provision. See *Barrows* v. *Jackson*, 346 U.S. 249, 253-54 (1953). In this instance as in every case, the disputed "discrimination must be based on differences that are reasonably related to the purposes" of the underlying rule or statute. *Morey* v. *Doud*, 354 U.S. 457, 465 (1957).

Immediately after the decision of the Appeals Court of Massachusetts, counsel for Etta Ross petitioned for rehearing. In light of recent decisions in the analogous area of sex-based classifications, counsel argued that the opinion of this Court in *Kahn* v. *Shevin*, 416 U.S. 351 (1974), required a different result. Indeed, the rationale used to uphold a classification in *Kahn* is directly applicable to the predicament of Etta Ross. The economic handicaps faced by women often force them to place property in their husband's name.[2] To presume a gift in each such instance is to ignore these economic and social pressures. The page from the petition for rehearing to the Appeals Court is included in Appendix B, *infra*, at 22a.

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[2] For example, the Appeals Court placed great weight on its own assumption that James Ross had cosigned the mortgage on the home at 61 Gatehouse Road. (App. A at 6a). Yet, legislation at the national and local level has been necessary to make it possible for women to take out bank loans without the husband's signature. Here, such a signature may have been something which the bank required as a formality. There was no proof nor suggestion of such a signature nor that he paid the mortgage payments.

The Appeals Court denied a rehearing. Counsel for Etta Ross then petitioned the Supreme Judicial Court of Massachusetts for further appellate review. Reliance again was placed upon *Kahn* v. *Shevin, supra.* Once more relief was denied. App. B at 23a.

While the Massachusetts courts did not choose to articulate reasons for rejecting the applicability of *Kahn* and the Equal Protection Clause, this is a case wherein decision of the federal questions "was necessary to the determination of the cause, and . . . the judgment as rendered could not have been given without it." *Brown* v. *Atwell*, 92 U.S. 327, 329 (1876). There was certainly no independent and adequate state ground to support the judgment. If the discriminatory presumption is unconstitutional, it simply cannot be used as the basis for giving away Etta Ross' property.

REASONS FOR GRANTING THE WRIT

The Court should review this case to remedy a widespread form of serious invidious discrimination inflicted by the law of many States upon either husband or wife in the settlement of property disputes during dissolution of the marital status.

I. The Court Should Review Etta Ross' Claim That She Was Denied Equal Protection of the Laws by the Judgment of the Appeals Court Which Applied a Discriminatory Presumption That When a Married Person Provides the Purchase Price for Property and Places Title in the Other Spouse's Name, the Former Is Gratuitously Giving the Property Away Forever, But That in the Indistinguishable Case Involving Unmarried Persons, No Gift Would Be Presumed.

The class against which the discriminatory presumption operates consists of married men and women who, for convenience, pay for property and place title in their spouse's name, or in both names. Upon dissolution of the marriage, this class of persons suddenly finds that a common law presumption decrees that they were giving away the property forever, unless they can show convincingly otherwise. The presumption, which in this type of case has been sharply criticized both by Scott[3] and the Restatement,[4] lacks any rational basis. It arose from fifteenth and sixteenth century common law concepts at a time when women were considered legal chattel.[5] Its effect is in this case to strip from a woman her lifetime earnings at a time when she is without means and health to recover, and to enrich her ex-husband unjustly with real and personal property that exceeds in value his total lifetime earnings.

As stated by the Appeals Court of Massachusetts, the presumption is as follows:

> ". . . [W]here a husband or wife . . . [citations omitted] provides the entire purchase price and

[3] IV A. Scott, Trusts, § 442, p. 3033 (2d ed. 1959).

[4] Restatement, Second, Trusts, § 442, pp. 402-403, Comment a (1959).

[5] A. Scott, *supra* note 3, § 440, at 3007.

> causes title to be put in the spouse's name, a contrary presumption arises, namely, that a gift to the spouse is intended." *Ross* v. *Ross, supra,* 314 N.E.2d at 893; App. A at 7a.

A long line of Massachusetts cases have applied this presumption, although in most instances the husband has been the victim of the discrimination. See, e.g., *McPherson* v. *McPherson,* 337 Mass. 611, 150 N.E.2d 727 (1958) (husband presumed to have given realty away to wife); *Tenczar* v. *Tenczar,* 332 Mass. 105, 123 N.E.2d 359 (1954) (husband held part owner of sums contributed by wife to bank account); *Hogan* v. *Hogan,* 286 Mass. 524, 190 N.E. 715 (1934) (husband presumed to own mortgage where wife transferred title to his name); *English* v. *English,* 229 Mass. 11, 118 N.E. 178 (1918) (husband presumed have given away realty placed in wife's name).

The presumption, which might have some rational basis during a continuing marriage, for estate transfer purposes, is totally irrational when the husband and wife divorce. Nonetheless, the Massachusetts courts apply the presumption rigidly.

Controlling principles applicable to this case have been articulated in *Kahn* v. *Shevin,* 416 U.S. 351 (1974), *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), and *Reed* v. *Reed,* 404 U.S. 71 (1971). While this case more specifically involves discrimination against persons on the basis of marital status, the same equal protection and due process principles apply. See also *Cleveland Board of Educ.* v. *LaFleur,* 414 U.S. 632 (1974); *Stanley* v. *Illinois,* 405 U.S. 645 (1972). Indeed, it is arguable here that the questioned presumption is akin to that in *Vlandis* v. *Kline,* 412 U.S. 441

(1973), because the presumption in practice is irrebutable except in rare cases, or for rare couples who consult property and estate lawyers before opening a joint banking account.

The equal protection principles which apply here are stated by the Chief Justice in *Reed* v. *Reed,* 404 U.S. 71, 76 (1971):

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the [common law rule], so that all persons similarly circumstanced shall be treated alike.' "

In *Reed* the Court struck down a probate statute which provided that as between persons equally qualified to administer an estate, males were to be preferred over females.

The classification here is not reasonable, but arbitrary, and has no rational relationship to any purported objective of the common law rule of which it is a part.

Apparently, the presumption is a crude attempt to bestow property rights upon persons thought to be the "natural object of bounty of the payor . . . ." IV A. Scott, Trusts, § 442, p. 3035 (2d ed. 1959). However, it is not rational to presume an absolute gift to a spouse when the parties might divorce. Neither an ex-husband nor an ex-wife may rationally be presumed to be a natural object of the bounty of the one they have deserted. Scott has criticized the presumption as follows:

> "The presumptions, however, are given undue weight. Indeed, in some decisions it has been

> stated that they can be rebutted only by very strong, clear or even conclusive or indubitable evidence. Such a rule clearly gives too great weight to the relationship between the parties. The question is really one of intention as shown by all the circumstances. The notion that intention can be determined by the application of hard and fast rules of law is common in primitive systems of law, but it tends to disappear as courts and lawyers become more sophisticated." *Id.*, § 442, p. 3036.

Indeed, even assuming the spouse to be the object of bounty, the assumption breaks down when the marriage is terminated because of irreconcilable deterioration of the relationship. If any presumption were valid, it is that the spouse is the natural object of bounty only so long as the marriage continues, not beyond that point.

Changes in law, society, and economics have rendered the presumption harsh and discriminatory today. In modern times, a husband might place title in joint names or his wife's name solely to avoid delay in administration of his estate if he dies first. It would surely come as a surprise that such an assignment was an absolute gift, irrevocable even in the event of divorce.

Similarly, the economic discrimination against women has often necessitated that they use joint accounts and place property in joint names with their husbands, or have their husbands cosign mortgages. Otherwise, the woman was excluded from the market. Yet, it is arbitrary and harsh to presume that each signature by the husband resulted in his gaining part or whole ownership forever, without any real consid-

eration. *Kahn* v. *Shevin, supra,* recognized this as follows:

> "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." 416 U.S. at 353.

In this case the Massachusetts Appeals Court has applied a discriminatory presumption of law which is arbitrary and lacks any rational basis. The presumption is an invidious discrimination against the class of married persons. A contrary rule applies when the parties are not married. This Court should recognize the large significance of this issue and grant review.

CONCLUSION

For the reasons set out above, the petition for writ of certiorari should be granted.

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APPENDIX

APPENDIX A—OPINIONS AND ORDERS BELOW

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
At Boston, October 1, 1974

ORDER

IN THE CASES

pending in the Appeals Court for the Commonwealth

It is hereby ORDERED, that the following Applications for Further, Appellate Review be denied:

* * * * * * * * * *

191M Etta B. Ross v. James W. Ross
A. C. #73-173 (Middlesex Superior)

* * * * * * * * * *

BY THE COURT,
/s/ (illegible)
Assistant Clerk

October 1, 1974

APPEALS COURT OF MASSACHUSETTS,
MIDDLESEX

ETTA B. ROSS

v.

JAMES W. ROSS, JR.

Argued October 12, 1973

Decided August 8, 1974

Wife brought suit in equity to establish her sole ownership of certain shares of corporate stock held in name of husband, of certain shares of stock and real property held in their names jointly, and of certain household furnishings and art objects in their home. The Probate Court, Middlesex County, Sullivan, J., entered final decree by which wife

was determined to be sole owner of all properties, with minor exceptions, and husband appealed. The Appeals Court, Armstrong, J., held that shares of bank stock were not wife's sole property but rather were joint property of parties, that hubsand did not hold his joint interest in certain realty on a resulting trust for wife, that wife had burden of proving that her contributions to joint account were not a gift for benefit of both spouses, and that there was consideration to bind oral promise by husband to hold in trust certain shares acquired in his name individually, but there was no such consideration in connection with acquisitions of other shares.

Reversed.

ARMSTRONG, Justice.

By this suit in equity the plaintiff seeks to establish her sole ownership of certain shares of corporate stock held in the name of the defendant, her "former husband"[1], of certain shares of stock and real property held in their names jointly, and of certain household furnishings and art objects in their home. In his counterclaim the defendant seeks a determination that certain real property in Lafayette, California, held in the plaintiff's name, is their joint property. The defendant has appealed from a final decree by which the plaintiff was determined to be sole owner of all the properties, with minor exceptions. The judge made a report of material facts. The evidence is reported in full.

"The appeal brings before this court questions of fact as well as of law. It is the duty of the court in these cir-

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[1] The report of material facts, entered more than a year after trial, so described the defendant. The pleadings indicate only that the defendant secured a decree of divorce in Nevada, that the validity of said decree is the subject of a bill for declaratory relief brought by the plaintiff and that the defendant brought a libel for divorce in the court below which was dismissed.

cumstances to examine the evidence and to decide the case according to its judgment; but the decision of the trial judge upon questions of fact based upon oral testimony heard by him will not be reversed unless it is plainly wrong. Lindsey v. Bird, 193 Mass. 200, 201, 79 N.E. 263 [1906]". Hogan v. Hogan, 286 Mass. 524, 525, 190 N.E. 715, 716 (1934). Krasner v. Krasner, — Mass. —, —,[a] 285 N.E.2d 398 (1972). Albano v. Jordan Marsh Co., — Mass. App. —, —,[b] 311 N.E.2d 568 (1974). "From the evidence we can find facts not expressly found by the judge. If convinced that he was plainly wrong we can find facts contrary to his findings." Lowell Bar Assn. v. Loeb, 315 Mass. 176, 178, 52 N.E. 2d 27, 30 (1943), and cases cited. Younker v. Pacelli, 354 Mass. 738, 739, 242 N.E.2d 141 (1968). Turner v. Guy — Mass. App. —, —,[c] 311 N.E.2d 921 (1974). —,[d] 311 N.E.2d 924 (1974).

We summarize the facts as found by the judge and by us. The parties were married in 1950 in California where the defendant was attending college and receiving a stipend under the G.I. Bill. The plaintiff was receiving rental income from some real estate, and was holding a part-time clerical job. The job terminated in 1951, when the parties had a daughter, their only child. After graduating the defendant worked for a time as a chemist for an oil company. While in California the plaintiff bought a parcel of land for $1,000 which the judge found to be her own money. That land, record title to which is in the plaintiff (defendant so states in his answer; there is no evidence on the subject), is in dispute in this case. In 1954 the couple moved to Madison, Wisconsin, where the defendant was a graduate student and was earning only fellowship or

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[a] Mass.Adv.Sh. (1972) 1263, 1264.

[b] Mass.App.Ct.Adv.Sh. (1974) 569, 569.

[c] Mass.App.Ct.Adv.Sh. (1974) 623, 623.

[d] Mass.App.Ct.Adv.Sh. (1974). —, — (decided June 10, 1974).

assistantship income. The plaintiff became a real estate broker and earned money from commissions and from capital gains on the resale of real estate she purchased. When they left Madison in 1957 to come to Boston, they had $14,000, which the judge found to be the sole property of the plaintiff.

At an undisclosed time the defendant became an assistant professor at the Massachusetts Institute of Technology (M.I.T.), an employment he left in mid-1962 to become vice president and director of research for Orion Research, Inc. (Orion), a company founded in August, 1962, by the defendant and three other persons. One of these persons held 1500 shares: the defendant and the others held 500 shares each. The defendant paid $500 for his shares, by a check drawn on the parties' joint checking account. The judge made no finding whether the $500 was the entire consideration for the shares issued. On the uncontradicted evidence by the President and Treasurer of Orion, respectively, we find that the $500 was nominal consideration only, and that the principal consideration was Orion's desire to retain the services and technical expertise of the defendant. In 1964 the defendant was given the opportunity to purchase another 500 shares, for a nominal $500, and did so, again drawing the check on the joint account. In 1966 the defendant purchased shares for a nominal price of ten cents apiece—this time 1333⅓ shares. These shares were issued at a time when Orion was arranging financing to develop manufacturing capacity, and the issue was apparently subject to a contingent liability for an additional payment if Orion failed to achieve a certain level of profitability over the ensuing five years. The contingency did not arise. In 1967 one of the original founders resigned: his 500 shares were purchased back by Orion and were resold to the other founders. The defendant purchased 127 of those shares on March 30, 1967, for a price of either $4,152.90 ($32.70 per share) or $4,762.50 ($37.50 per share) by check drawn on the joint account. The funds thus

drawn had been deposited for that purpose by the plaintiff, who obtained the funds by pledging a savings bank passbook issued in her name alone. On the same day, March 30, 1967, the defendant purchased 169⅓ shares from Orion for a nominal price of ten cents per share, or $16.93. Later in 1967—the year Orion shares were first sold publicly — approximately 500 shares were purchased by the parties and were issued in the name of the defendant as custodian for their daughter. These last shares, which cost in excess of $18,000, are not in dispute. All other shares purchased —originally totalling 2629⅓ shares but now totalling 68,716 shares due to stock splits—although issued in the name of the defendant individually, are claimed by the plaintiff as her sole property.

The defendant was salaried during the employments discussed. His annual salary at M.I.T. was between $9,000 and $10,000. He started with Orion in 1962 at $12,000 per year, by 1964 was paid $15,000 per year, and by 1967, $18,000 per year.

After coming to Boston the plaintiff continued her activities in real estate investment and realized substantial gains, notwithstanding limited capital, by purchasing properties with heavy mortgage financing and then selling them at a profit. In 1961 she owned in her own name a six-apartment house on Bowdoin Street in Cambridge from which she received gross rental income of $11,000 per year and which she operated at a profit. She sold the property that year for $50,000, for a profit of $15,000. Between 1961 and 1964 she owned in her own name a three-apartment building at 7 Chauncy Street in Cambridge, which she operated at a profit, and which she sold in 1964, along with 9 Chauncy Street, for $185,000. Her gain on the sale was $100,000. Her rental income, gains from the sale of real estate, and income and gains from the purchase and sale of stock were all deposited in the parties' joint checking account. The parties during this period also held in

their joint names the house they then lived in at 140 Dudley Road, Newton, which was sold in 1965 for $50,000, a profit of $15,000. In 1964 they purchased their present family house, 61 Gatehouse Road, Newton, for $52,500. They mortgaged the house for slightly more than half of its purchase price. Their own payment consisted of two cashier's checks purchased with funds from the joint checking account, which the judge found to be "her sole property." The judge also found, "The title to the house was put in their names as tenants by the entirety just for convenience. I find that there was no intent to make a gift of the property to him or to give him any interest in the property. It was just done for convenience with the understanding that in reality it was to be her sole property."

During this period the parties purchased various works of art and household furnishings, title to which is here in dispute, and as to the value of which there was sharply conflicting testimony. Little purpose would be served by reciting the testimony concerning the many purchases. The items were all paid for by checks drawn on the joint account, usually written by the plaintiff, sometimes in the defendant's presence. Sometimes the purchases (according to the judge's finding) were accompanied by bills of sale made out to the plaintiff. The judge found that, with the exception of two primitive wood carvings, which the plaintiff testified she bought as gifts for the defendant, all the art works and household furnishings were paid for by the plaintiff from her sole funds, that title to them was taken in her name, and that she had no intention of giving any beneficial interest therein to the defendant.

The last item in dispute is 124 shares of Cambridge Trust Company (bank) common stock, held in the parties' names jointly. The shares were purchased by the plaintiff directly from the bank, out of the proceeds of the sale of other shares of stock. The latter shares were purchased

subsequent to 1957 with funds from the parties' joint account but were registered in the plaintiff's name alone. The judge found that the plaintiff furnished the entire consideration for the purchase of the bank shares, that "she put the stock in the joint names for convenience only, after discussing with the bank the advantages of doing this, mainly the income tax deduction", and that "the . . . [defendant's] name was used on the shares of stock as a joint tenant merely for convenience and that no gift was intended to him."

The Shares of Bank Stock.

The general rule is well settled that where one provides the entire purchase price for property but causes title to be transferred to another, a presumption arises that the latter holds the property on a resulting trust for the one who provided the entire purchase price. This rule is subject to the exception that where a husband or wife (as to the wife, see English v. English, 229 Mass. 11, 12, 118 N.E. 178 [1917]; Hogan v. Hogan, 286 Mass. 524, 526, 190 N.E. 715 [1934], and Tenczar v. Tenczar, 332 Mass. 105, 106-107, 123 N.E. 2d 359 [1954]; contra, Scott, Trusts [3d ed.], § 442, pp. 3336, 3337; Restatement 2d: Trusts, § 442, comment a, p. 403) provides the entire purchase price and causes title to be put in the spouse's name, a contrary presumption arises, namely, that a gift to the spouse is intended. Either presumption is rebuttable by a showing on clear evidence that the actual intent was different from that which would otherwise be presumed. Frank v. Frank, 335 Mass. 130, 135, 138 N.E.2d 586 (1956), and cases cited. Krasner v. Krasner, — Mass. —, —,[e] 285 N.E.2d 398 (1972). The same principles apply to property paid for solely by one spouse but transferred to the spouses jointly. McPherson v. McPherson, 337 Mass. 611, 613-614, 150 N.E.2d 727 (1958).

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[e] Mass.Adv.Sh. (1972) 1263, 1265.

There was evidence to support the judge's finding that the plaintiff paid for the 124 shares of bank stock solely from her own assets. The evidence does not, however, support his finding that the plaintiff intended no beneficial interest to pass to the defendant. The basis for the judge's finding can only be the plaintiff's testimony to the effect that she was indifferent whether the shares were issued to her alone or to her and the defendant as joint tenants, and that her decision to have them issued jointly was based on advice by an official of the bank that she could thereby take advantage of each spouse's $100 Federal income tax dividend exclusion. See 26 C.F.R. § 1.116-1(b). This evidence is insufficient to rebut the presumption that she intended the defendant to have a beneficial interest in the shares. To the contrary, as this evidence might tend to show an intention that he receive income from the shares, it supports rather than derogates from the presumption. See English v. English, 229 Mass. 11, 12, 118 N.E. 178 (1917) and Goldman v. Finkel, 341 Mass. 492, 493-494, 170 N.E.2d 474 (1960). There is no evidence of an agreement or understanding between the parties with respect to the shares, as in Blanchette v. Blanchette, — Mass. —, ———,[f] 287 N.E.2d 459 (1972). As the burden was on the plaintiff to overcome the presumption (DePasqua v. Bergstedt, 355 Mass. 734, 736, 247 N.E.2d 354 [1969]), it was error to rule that the shares were her sole property. Rather, they are the joint property of the parties. The precise nature of the joint interests we cannot determine on the record before us. The certificates are not in evidence, nor is there other evidence bearing on the form of ownership as shown in the bank's records. As there is no evidence to the contrary, the wife has not sustained her burden of showing that the formal indicia of ownership are not to be taken at face value. Blanchette v. Blanchette, *supra*, — at —,[g] 287 N.E.2d 459.

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[f] Mass.Adv.Sh. (1972) 1643, 1644-1646.

[g] Mass.Adv.Sh. (1972) at 1647-1648.

The Property at 61 Gatehouse Road.

The judge's finding that the plaintiff paid the entire purchase price for the house and lot at 61 Gatehouse Road, Newton, has its basis in the plaintiff's testimony that she purchased the cashier's checks from her own funds and with them furnished all of the funds for the purchase of the property "over and above the amount of the mortgage." Absent contrary evidence, we must infer that as the title was taken jointly the defendant, as well as the plaintiff, signed the note secured by the mortgage at the time of the purchase. Goldman v. Finkel, 341 Mass. 492, 493-494, 170 N.E.2d 474 (1960). There is no evidence that the defendant's participation was a loan of credit. See Murphy v. McKenzie, — Mass. App. —, ——,[h] 303 N.E.2d 744 (1973). Therefore, the plaintiff did not furnish the entire purchase price (McPherson v. McPherson, 337 Mass. 611, 614, 150 N.E.2d 727 [1958], and cases cited), and the judge's finding to the contrary is plainly wrong. It follows that the defendant does not hold his joint interest on a resulting trust for the plaintiff. Assuming there is support in the testimony for the judge's finding of an "understanding that in reality it [61 Gatehouse Road] was to be her sole property", which might be taken to suggest the existence of an express trust, we note the absence of any finding or evidence of a written instrument of trust. G.L. c. 203, § 1. Chace v. Gardner, 228 Mass. 533, 535, 117 N.E. 841 (1917).

The final decree is erroneous as applied to 61 Gatehouse Road. That property is held by the parties as tenants by the entirety, or, if they are now divorced (a matter left unclear on the record before us[2]), as tenants in common. Bernatavicius v. Bernatavicious, 259 Mass. 486, 490, 156 N.E. 685 (1927).

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[h] Mass.App.Ct.Adv.Sh. (1973) 661, 663-664.

[2] See fn. 1.

The Art Works and Household Furnishings.

There is as to the several items in this category no finding or evidence of any agreement or understanding between the parties as to their ownership. The judge's "finding" that title was taken in the plaintiffs' name is a ruling of law, apparently based on his finding that the several items were purchased by the . . . [plaintiff] with her own money." As each item was purchased, on the plaintiff's own admission, by a check drawn on the joint account, the finding that the purchase money was the plaintiff's sole property appears to rest on another finding to the effect that the joint account was the plaintiff's sole property. Although a "finding as to the respective interests of the parties in joint deposits during their lives is a pure question of fact" (Blanchette v. Blanchette, — Mass. —, ———,[i] 287 N.E.2d 459, 461, [1972] such a finding, like any other, must be supported by the evidence. The judge's finding as to the ownership of the joint account in this case is not based upon evidence of any agreement or understanding between the parties. Rather, the evidentiary basis appears to be the repeated assertions by the plaintiff that the joint account was her own property. In the circumstances of this case we regard those assertions as a legal opinion or conclusion, and not as evidence having probative value.

Alternatively, the evidentiary basis may have been the plaintiff's testimony that the defendant "was supposed to have paid for the household expenses", that his paychecks, which she admitted were at least sometimes deposited in the joint account, were insufficient to pay for the household expenses, and that therefore the only money available in the joint account to pay for the art objects and household furnishings was the money she deposited. Assuming all this to be true, it does not follow that the art objects and

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[i] Mass.Adv.Sh. (1972) 1643, 1645-1646.

furnishings were purchased with her sole money. She had the burden of proving that her contributions to the joint account were not a gift for the benefit of both spouses. D'Amico v. D'Amico, — Mass. App. —, —, [1] 303 N.E.2d 737 (1973), and cases cited. As there was no evidence sufficient to sustain that burden, it follows that the art objects and furnishings must be regarded as having been purchased with the parties' jointly owned money.

In the absence of evidence to show an understanding or agreement of the parties as to ownership of the art objects and furnishings, or evidence bearing on their intention at the time of acquisition, we are of the opinion that household furnishings, used as such in the family home, when purchased after marriage with the parties' joint moneys, or proceeds of the sale of such property, must be presumed to belong to the parties as joint tenants. There is evidence to the contrary as to the two primitive wood carvings. The plaintiff testified that she purchased them as gifts for the defendant and that he accepted them as such. There was no evidence to rebut the presumption of joint ownership with respect to the other items of art works and household furnishings. As to them the final decree is in error.

The Orion Shares

There were five separate acquisitions of Orion shares in the name of the defendant individually. As to four of those acquisitions—500 shares in 1962, 500 shares in 1964, 1333⅓ shares in 1966, and 169⅓ shares in March, 1967—our findings that the purchase price was only nominal consideration and that the greater part of the consideration was furnished by the defendant in services and expertise, and in addition our ruling that the joint account from which the nominal cash consideration was paid was joint property, both preclude the possibility that the defendant

[1] Mass.App.Ct.Adv.Sh. (1973) 669, 670-671.

holds these shares on resulting trust for the benefit of the plaintiff. Charest v. St. Onge, 332 Mass. 628, 631, 127 N.E.2d 175 (1955). McPherson v. McPherson, 337 Mass. 611, 614, 150 N.E.2d 727 (1958). Goldman v. Finkel, 341 Mass. 492, 494, 170 N.E.2d 474 (1960). If we were to assume that the nominal cash payments were her sole property, "where one pays but a part of the purchase price and seeks to enforce a resulting trust in his favor, it must be shown that the payment made by him was for some specific part or distinct interest in the estate." Druker v. Druker, 308 Mass. 229, 230, 31 N.E.2d 524, 525 (1941). No such showing was made here.

As to three of the acquisitions—500 shares in 1962, 500 shares in 1964, and 127 shares on March 30, 1967—we find evidence (scant, perhaps, but enough so that we cannot say the judge was plainly wrong[3]) to support the judge's findings of agreements between the parties that the shares, when acquired, would belong to her. Although the findings suggest the creation of several express trusts, the shares of stock which were to constitute the res of each trust had not been acquired or issued at the time of the agreement or declaration of trust pertaining thereto. Trusts were therefore not created at the time of the several declarations. Scott, Trusts (3d ed.) § 75. Bennett v. Littlefield, 177 Mass. 294, 300, 58 N.E. 1011 (1901). The judge's findings establish at best oral promises by the defendant to create trusts when the shares at issue were acquired. These were not binding as contracts unless supported by consideration. Scott, Trusts (3d ed.) § 86, p. 712.

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[3] The clearest evidence related to the 127 shares purchased in March, 1967, concerning which the plaintiff testified that the defendant said to her, "Sweetheart, please mumsy, they must stay in my name, so I have leverage. But these will always be there for you, mumsy, you know that. I have no reason to have them for myself."

We find no such consideration in connection with the acquisitions of the 500 shares in 1962 [4] and the 500 shares in 1964. As the plaintiff admitted, the defendant was free to draw on the account without permission; and we have already concluded he could do so as matter of right.

There was consideration to bind a promise to hold in trust the 127 shares acquired on March 30, 1967. The judge found that the plaintiff provided the purchase price for those shares by pledging a savings bank passbook standing in her own name. As to those 127 shares, and such additional shares as have been derived from them, we find no error in the judge's determination that they are the sole property of the plaintiff. We hold that the other 2502⅔ shares, and such additional shares as have been derived from them, are the sole property of the defendant.

The Parcel of Land in Lafayette, California

The judge found that the plaintiff purchased the parcel of land in Lafayette, California, with her own money. Apart from the admission in the defendant's answer that the parcel "stand[s] in her name," there is no other evidence from which the circumstances of the acquisition of the property may be inferred. See Cal.Civil Code, § 5110. The burden was on the defendant to introduce evidence to establish his claim that she holds the property in trust for the joint benefit of both parties. The defendant's testimony, in conflict with that of the plaintiff, was that the parcel was paid for from a joint account in which the earnings of both parties had been deposited. The judge was not required to, and did not, believe the defendant's testimony. The judge's findings could not have supported a decree to the effect that the defendant had a beneficial interest in the property. Assuming that there was error

[4] It should also be noted that it was not until the effective date of St. 1963, c. 765, that contracts between husband and wife became generally enforceable.

in the judge's omission to include a determination as to ownership of the parcel in his final decree, the omission would not prejudice the defendant, and the plaintiff did not appeal. D'Amico v. D'Amico, — Mass.App. —, —, n. 1,[k] 303 N.E.2d 737 (1973).

The final decree is reversed. A new final decree is to enter in conformity with this opinion.

So ordered.

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT

Equity # 1377

Decree for Determination of Title to Real and Personal Property

MIDDLESEX, ss.

At a Probate Court held at Cambridge in and for said County of Middlesex, on the twenty-third day of November in the year of our Lord one thousand nine hundred and seventy-one.

On the petition as amended in equity of Etta B. Ross, petitioner, against James W. Ross, Junior, respondent; Representing that she is the petitioner on a petition of separate support brought by her and the libellee on a libel for divorce brought by him which are now pending in said Court; that she is the owner of approximately 68,000 shares of capital stock of Orion Research, Inc., a Massachusetts corporation standing in his name alone, of certain household furniture and furnishings; and of 124 shares of common stock of the Cambridge Trust Company, a Massachusetts corporation standing in their joint names and of the real estate located at 61 Gatehouse Road in

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[k] Mass.App.Ct.Adv.Sh. (1973) 669, 671, n. 1.

Newton in said County of Middlesex standing in the names as tenants by the entirety, which he has converted to his own use: and praying for a temporary restraining order and preliminary injunction; that said Court determine the ownership of said real and personal property; for an accounting and for such further relief as may seem meet.

It appearing that notice according to the order of the Court has been given to all parties interest; and that said respondent has appeared and answered:

After hearing and consideration, the Court orders and decrees that all the shares of stock now in the name of James W. Ross, Junior in the Orion Research, Inc., is ordered adjudged and decreed to be the sole property of the petitioner and the respondent is forthwith to deliver said shares of stock to the petitioner; if any of the said shares of stock have been sold, he is to account to the petitioner for the proceeds of said sale; that the shares of stock in the Cambridge Trust Company is decreed and adjudged to be the sole property of the petitioner; that the real estate located at 61 Gatehouse Road, Newton, is adjudged and decreed to be the sole property of the petitioner and respondent is ordered forthwith to execute and deliver a deed to said property to said petitioner; that all of the personal property listed in the respondents answer, Schedule A is ordered, adjudged and decreed to be the sole property of the petitioner, except the primitive art wood carvings which are the sole property of the respondent and the 1934 motor vehicle which has been sold.

/s/ JEREMIAH J. SULLIVAN
Acting Judge of Probate Court

Dated Nov. 23, 1971.

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT

MIDDLESEX, ss.

Equity No. 1377

ETTA B. ROSS
v.
JAMES W. ROSS, JUNIOR

Report of Material Facts

A request for a report of material facts which was duly filed in this case, and I find the following:

It is a suit in equity by a wife against her former husband to determine the title to certain shares of stock, to a house and to certain articles of personal property in the house. The parties have one child, a daughter, who was born in 1951 and is now age 21.

The petitioner, Etta B. Ross, lives at 61 Gatehouse Road, Newton, Massachusetts. This is the parcel of real estate, the title of which is in controversy. The petitioner has kept records of her joint checking account with the respondent from 1960 to 1967, this includes a record of the deposits and withdrawals and a few of these records are missing.

The respondent was employed for the first six months of 1962 at M.I.T. which employment terminated June 30, 1962, when he lost his job. On August 1, 1962, from a joint checking account he had with petitioner, a check for five hundred dollars was made out payable to Orion Research Inc. which he signed. He was one of the original organizers of this corporation and needed the shares of stock in order to help him in his job with the corporation, in other words to give him leverage. As to the joint checking account the respondent each month from January to July, 1962, deposited a check in the sum of $494.01. This money was to be used to pay the household expenses of the petitioner, himself and his daughter. Many instances this

amount was not enough to pay for the ordinary household expenses and, as a result, the petitioner, from her rental income, had to make up the difference. I find that as to the joint checking account, the petitioner made the following deposits: in January, 1962, $687.50; February $651.81; March $687.50; April $662.45; April $250.00; May $850.50; June $393.60; June $797.75; July $69.50; July $18,290.59. These amounts were all of the petitioner's monies which she secured from rental property solely in her own name and in some instances from the shares of securities owned solely by her or real estate sold and owned solely by her.

I find that the $500.00 withdrawn from the joint checking account to pay the original five hundred shares of Orion Research Inc. was her money and that the shares of stock were taken in her husband's name solely for the purpose of giving him leverage with the company. I find that it was the intention of the parties that these shares of stock and other shares of stock similarly purchased were to be the sole property of the petitioner. That no gift was intended, but the intention of the parties was that the shares of stock were put in the respondent's name, particularly shares of the Orion Research Inc., merely to give him a standing with the company.

He was elected Vice President of the Corporation when it was formed.

In May 1964, she deposited in the joint checking account $756.25 from her real estate income. In April 1964 she deposited $540.40; April $450.00; March $7,600.48; February $265.00. These amounts were all earned by her and her own money. During this period the respondent made no deposits in the joint checking account. In June 1964, another five hundred dollar check was drawn to purchase 500 shares of Orion Research Inc., and they were purchased with the same understanding by petitioner and respondent that they were his in name only, but because her money paid for them that they were her shares of stock. I find

that he said that he would protect her and her money. In March 1967, the respondent wanted to purchase additional shares in said corporation and the petitioner gave him $4,157. to buy said shares. In order to get the money, she pledged a passbook at the North Avenue Savings Bank, said account being in her name alone.

From January 1967 through July 1967, I find that she deposited the following amount of money in the joint account. This money was from rents from various pieces of property she owned in Cambridge and from securities, and from the sale of certain real estate in Cambridge, Re: $208,144.64.

I find that the sum of $4,152., paid for the purchase of Orion Research Inc., was used to buy the shares of stock of a man who was leaving the company; that said respondent took these shares in his own name so that these additional shares would give him even more leverage with the Company. I find that he agreed that it would be her shares of stock. He bought additional shares in 1967 of the same corporation under the same conditions.

I find that one time the petitioner was elected a director of the corporation but later she resigned at respondent's insistence. I find that from 1960 on, she was engaged in investing in real estate; that the property was bought in her name alone, with her money; that she paid all the expenses, collected the income and made all financial arrangements from 1960 on. She also was engaged in the investments of certain stocks. For convenience she placed some of them in their names jointly and others in her name alone. In regard to the purchase of said shares of stock, the respondent contributed nothing. In 1961, she was the owner of the Bowdoin Street, Cambridge, six-apartment house. She received as a gross income $11,000. a year. She sold said property in 1961 for $50,000. with a net profit to her of $15,000.00. She also owned at this time 7 Chauncy Street, Cambridge, a three-apartment house, which she

bought with her own money. She collected all the rents and paid all the expenses. She sold 9 Chauncy Street with another piece of property with a net profit of $100,000.00. These profits were deposited in a joint checking account and was solely her money. She also owned real estate consisting of six apartments on Francis Street, Brookline, but only for a short time and was sold for no profit. In 1964, she bought the house on 61 Gatehouse Road, Newton, for $52,500.00. This was purchased with her own funds. She made all the financial arrangements to help finance the purchase of the property. She bought a bank check at a Cambridge bank in the sum of $19,550.25, plus another bank check from the Cambridge Trust Company. These two purchases were made from the joint checking account which was her sole property. The title to the house was put in their names as tenants by the entirety just for convenience. I find that there was no intent to make a gift of the property to him or to give him any interest in the property. It was just done for convenience with the understanding that in reality it was to be her sole property. The petitioner bought with her own money land in California where they first were married and lived in California. I find that all of the personal property in the house including the furniture, paintings and antiques were purchased by the petitioner with her own money and title was taken in her name; and in many instances the bill of sale was in writing to her, with the exception of two small antiques which I found were the respondent's property. I find that the respondent was not interested whatsoever in antiques and went to these various antique shops just to please his wife. Much of the property was bought at Joseph's Gallery in Boston.

I find that the values set by the respondent in his answer of setoff were exorbitant and in no way reflect the present values of the personal property.

I find that most of the furniture in the house is second-hand and was paid for by the petitioner with her own

money, and that she intended to make no gift to the respondent of said furniture. I find that they were married in 1950 in California; that he was a college graduate; that they went to Wisconsin where he studied for his doctorate degree, and during those years she was the only one who was working and had any money and paid practically all the expenses. He received a small sum, a fellowship grant which he put in the joint checking account. However, not all these checks were put in the joint checking account, and sometimes he would cash the checks and spend it on himself. When she left Wisconsin, I find that the petitioner had $14,500. When they arrived in Cambridge, she still had this money and he had nothing. She also put into their joint checking account an inheritance from her mother's estate.

I find that when the petitioner requested that the various types of stock be put in her name, especially the Orion Research Inc. stock, he told her that the corporation would be upset if the stock were in her name; that the President, Chairman and Board were strictly opposed to the wife being involved in the corporation.

The petitioner was assured by the respondent that her interest in these shares of stock was protected, because it was her money that was used to purchase them.

The petitioner also purchased 125 shares of common stock of the Cambridge Trust Co., a Massachusetts banking corporation. The stock was put in their joint names. The entire consideration for this stock was paid for by the petitioner with a check that she received from the sale of other stock which was in her name alone. She furnished the entire consideration for this purchase. I find that she put the stock in the joint names for convenience only, after discussing with the bank the advantages of doing this, mainly the income tax deduction.

I find that in all of the transactions including the real estate and the Orion Research Corporation stock and the

Cambridge Trust Co. stock were bought with the petitioner's funds only, and that no gift was intended by making the deposits in the joint account and the later purchases of stock and real estate; that the respondent's name was used on the shares of stock as a joint tenant merely for convenience and that no gift was intended to him; that the purchase of the Orion stock was just of a matter of convenience to him, which the petitioner permitted, so that he could be Vice President and have influence in the corporation. The agreement was that she was to furnish the funds, but the stock belonged to her. They put his name merely for leverage with the corporation.

I find that all of the personal property listed in Exhibit A of the counterclaim was bought and paid for by her with her own money and belonged to her and none of it except two primitive art wood carvings belonged to the respondent. No gift was intended to him. The Orion stock he was holding as trustee for his daughter, he admitted was his daughter's stock and, therefore, she, now having reached the age of 21, is entitled to this stock.

As to the testimony of the petitioner and the respondent, I believed the petitioner and disbelieved the respondent.

The respondent claiming to be aggrieved by said decree, duly appealed and requested a report of material facts.

/s/ JEREMIAH J. SULLIVAN
Acting Judge of Probate

Sept. 29, 1972.

Filed Oct. 5, 1972.

ETTA B. ROSS

v.

JAMES W. ROSS, JR.

No. 1377—Equity

Motion for Stay of Entry of Judgment

Filed Nov. 18, 1974.

Middlesex, ss. Probate Court.

Nov. 18, 1974.

The within motion is hereby allowed.

/s/ (Illegible)
Judge of Probate Court.

For Petitioner:

SIDNEY GOROVITZ, ESQUIRE
HURST, PIZZELLA & GOLDBERG
93 Purchase St. Sixth Floor
Boston, Mass. 02110
Tel. 482-3303

For Respondent:

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APPENDIX B—EXCERPTS FROM RECORD

Petition for Rehearing, Ross v. Ross, Appeals Court, p. 3

"* * * (1917). However, *English* (supra) involved a transfer from a husband to a wife, and preceded *Glover* (supra) which specifically ruled that there is a presumption of a trust under such circumstances. Further none of the cases cited deal with a transfer from a wife to their joint names.

Although the decision may implicitly find no distinction between a transfer by a husband to a wife, or from wife to husband, the presumption of resulting trust in the "wife to hubsand" situation should not be implicitly eliminated in view of the prior Massachusetts law, the view of Scott, *Trusts*, the Restatement 2d, *Trusts*, and the recent decision of the United States Supreme Court in *Kahn* v. *Shevin*, 94 S. Ct. 1734 (1974) which found a Florida statute giving preferential tax treatment to widows, and not widowers, validly based on the presumption of the inferior economic position of females as a result of marriage.

In any event, here there was direct testimony that title was put in their joint names for tax purposes. (See references to transcript, P. 5 of brief of Etta B. Ross in reply to brief of amicus curiae, * * * "

Application for Leave to Obtain Further Review, p. 8
Ross v. Ross, Supreme Judicial Court

"* * * ruled that there is a presumption of a trust under such circumstances. Further none of the cases cited deal with a transfer from a wife to their joint names.

Although the decision may implicitly find no distinction between a transfer by a husband to a wife, or from a wife to husband, the presumption of resulting trust in the "wife to husband" situation should not be implicitly eliminated in view of the prior Massachusetts law, the view of Scott, *Trusts*, the Restatement 2d, *Trusts*, and the recent decision of the United States Supreme Court in *Kahn* v. *Shevin*, 94 S. Ct. 1734 (1974) which found a Florida statute giving preferential tax treatment to widows, and not widowers, validly based on the presumption of the inferior economic position of females as a result of marriage.

In any event, here there was direct testimony that title was put in their joint names for tax purposes. (See refer-

ences to transcript, P. 5 of brief of Etta B. Ross in reply to brief of amicus curiae, P. 8 of opinion). This rebuts any donative intent.

I. When a wife makes deposits in a joint account with her husband, is there a presumption that it is a gift to the husband and he may spend any or all of the money on anything and take title solely in his own name?

The issue arises in the course of the decision on ownership of 5 blocks of Orion Research Inc. stock. * * * "

SUPREME COURT, U. S.

Supreme Court of the United States.

October Term, 1974.

No. 74-517.

ETTA B. BOSS,
Petitioner,

v.

JAMES W. BOSS, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS.

Brief in Opposition to Petition for a Writ of Certiorari.

James C. Harrington,
Jerry W. Marshall,
Harrington & Lambert,
One Court Street
Boston, Massachusetts 02108.

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Supreme Court of the United States.

October Term, 1974.

No. 74-817.

ETTA B. ROSS,
Petitioner,
v.
JAMES W. ROSS, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS.

Brief in Opposition to Petition for a Writ of Certiorari.

Counterstatement of the Case.

In this case the petitioner seeks to present to the Court questions of an allegedly constitutional nature arising from a decision of the Massachusetts Appeals Court which adjudicated the rights of the petitioner and the respondent, her former husband, to various categories of property acquired by the parties during their marriage. It is the position of the respondent that certiorari should not be granted in this case because no substantial issues of a constitutional

dimension are presented. First, however, it is necessary to provide an alternative statement of the case insofar as the petitioner's statement of the case relates to the specific rulings of the Massachusetts Appeals Court.

The petitioner seeks to attack a presumption applied by the Appeals Court that when a married person pays for property placed in the spouse's name, a gift is presumed to have been intended, as opposed to the resulting trust that would be presumed had the parties not been married. The petition characterizes the Appeals Court opinion as adjudicating the rights to virtually all of the property involved by reference to that presumption (Petition at 5-7); a careful reading of the opinion itself (Petition at 1a-14a), however, shows that the gift presumption was used to adjudicate rights to a relatively minor portion of the property, consisting of 124 shares of bank stock (Petition at 7a-8a). As to the marital domicile, the court merely held that the petitioner did not prove that she had paid the entire purchase price (Petition at 9a); therefore the question of whether a resulting trust should be presumed did not arise.

Nor was a resulting trust question raised by the court in its treatment of the art works and household furnishings. The court held that the petitioner failed to prove that her contributions to a joint checking account used to purchase the property were not gifts for the benefit of both spouses (Petition at 10a-11a). The implicit presumption that they were gifts, however, did not arise from a "marital" exception to the resulting trust rule. Such contributions to a joint checking account are not *purchases* of property in the name of another, but are more like gratuitous conveyances of property, as to which no resulting trust presumption arises in any event. See Scott, *Trusts* (3d ed. 1967), § 405, pp. 3219-3220; Pomeroy, *Equity Juris-*

prudence (5th ed. 1941), § 1035. Thus, as to the joint checking account and the property purchased from it, the court was applying a presumption which would have been the same had the parties not been married, at least while both were still living. See *Astravas* v. *Petronis*, Mass. Adv. Sh. (1972) 521; 280 N.E. 2d 183.

Finally, there was no resulting trust question raised in the court's discussion of the Orion shares (Petition at 11a-13a). Rather, the court held that the petitioner failed to prove that she paid either the total or a specific part of the purchase price of shares placed in the respondent's name; in fact the court held that the money used to purchase most of the stock was nominal consideration only, and that the real consideration was the respondent's services which he provided to Orion as an employee. Thus, contrary to the petitioner's assertions (Petition at 5), there was no occasion for the court to apply the "marital exception" to the resulting trust rule in adjudicating rights to the Orion stock.

Argument.

I. The Presumption Applied to the Bank Stock by the Appeals Court and Attacked by the Petitioner is Not Based on Marital Status, but is Much Broader.

Generally when one purchases property with his own money and has title placed in another person's name, that other person is presumed to hold the property on a resulting trust for the person who paid for it. However, there are many circumstances in which a gift to the title holder will be presumed. One of those circumstances—marriage—was involved in the state court proceedings below. In seeking review of this case the petitioner seeks to portray the marital exception as the only exception to the resulting trust rule, thus bringing the exception be-

fore the court in the light of recent cases which have held invalid some classifications based on marital status.

A review of trust law makes it clear, however, that the exception to the resulting trust rule it much broader than the petitioner asserts. The same "gift" presumption has been held to apply where a father purchases property in the name of his son, daughter, son-in-law, illegitimate child or adopted child. See Scott, *Trusts* (3d ed. 1967), § 442, pp. 3333-3336. Thus, Scott characterizes the exception in this way: "The question is . . . whether the grantee is a natural object of bounty of the payor, whether he stands in such a relationship to the payor that it would be natural for the payor to make provisions for his advancement." Scott, *supra*, at 3340. Thus the exception to the resulting trust rule applied by the Appeals Court is not based merely on the marital relationship, but goes much deeper into the relationship between the parties to ascertain whether the payor might naturally have wanted to care for the grantee.

II. However Phrased, the Exception to the Resulting Trust Rule Applied by the Appeals Court to the Bank Stock and Attacked by the Petitioner Clearly does Not Raise Constitutional Questions.

Even assuming that the exception applied by the Appeals Court can be treated as one based only on the marital status of the parties, the court's opinion does not raise questions of a serious constitutional nature. A classification based on marital status used to adjudicate rights to property does not invoke a strict judicial scrutiny test (see *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 18-40 (1973)); in fact the petitioner concedes (Petition at 12) that a more traditional equal protection analysis applies. Thus the question is whether the "mari-

tal" exception to the resulting trust rule is reasonable. The answer is clearly in the affirmative.

As discussed, *supra*, the marital exception is based simply on the notion that a spouse is one for whom a person can be expected to care and provide. The petitioner attacks this rationale as outdated. Her argument (Petition at 10) that the "marital" exception arose at a time when women were considered chattel is clearly not on point, since in the present case itself the husband was the beneficiary of the exception. More to the point, the petitioner argues that divorce (and, presumably, increasing divorce statistics) destroys the rationale of the "marital" exception. Insofar as the petitioner argues that upon divorce the presumptions of intent applicable to marital purchases and conveyances should change, her argument flies in the face of the well-settled doctrine that gifts and resulting trusts are made, and intent is to be determined, with reference to the status and conduct of the parties at the time of the operative events, and *not* at the time when the parties seek judicial resolution of their differences. Insofar as the petitioner argues that the possibility of divorce makes the marital exception irrational, the Court should be hesitant to rule that married persons cannot be expected to care and provide for one another.

The petitioner cites many situations in which the "marital" presumption will be contrary to the intent of the parties.[1] The answer to this contention is simply that it is

[1] "The class against which the discriminatory presumption operates consists of married men and women who, for convenience, pay for property and place title in their spouse's name, or in both names." Petition at 10. "In modern times, a husband might place title in joint names or his wife's name solely to avoid delay in administration of his estate if he dies first. . . . Similarly, the economic discrimination against women has often necessitated that they use joint accounts and place property in joint names with their husbands, or have their husbands cosign mortgages." Petition at 13.

precisely because of such possibilities that the presumption is rebuttable. The petitioner's attempt to paint the presumption as irrebuttable is not convincing. According to Scott, "[e]ven though the grantee is so related to the payor as to be a natural object of his bounty, parol evidence is admissible to rebut the presumption of a gift and to show that a trust was intended." Scott, *Trusts* (3d ed. 1967), § 443, p. 3343. Case law bears out this observation. See, e.g., *Robinson* v. *Robinson*, Mass. Adv. Sh. (1974) 2444, 2449; N.E. 2d , , where the Massachusetts Supreme Judicial Court noted in a similar case that gift and resulting trust presumptions "embody or rest on common sense ideas for discerning intention, but they operate, when they operate at all, only in the absence of countervailing or rebutting factors, the goal in all cases being to reach a fair interpretation of the totality of the facts." Nor can it be argued that the gift presumption was given undue weight in the present case. In fact, the Appeals Court noted that the only evidence offered to rebut the presumption—the petitioner's concern for the tax consequences of the purchase of the bank stock—supported rather than rebutted the gift presumption (Petition at 8a). Thus the present case clearly does not present for the Court's review a presumption which is irrebutable.

Conclusion.

In the present case the opinion of the Massachusetts Appeals Court does not raise questions of a serious constitutional nature which should be reviewed by this Court. The Petitioner is in effect asking the Court to review and reverse the holding of the Appeals Court as to a minor portion of the total property involved. However, to do so on the constitutional grounds suggested, the Court would

have to change radically the common law of most states regarding marital gifts and resulting trusts. The law of resulting trusts and the exceptions thereto, marital and otherwise, present interesting questions of public policy which go to the core of the relationships between people and their dealings with one another. It may very well be that the presumptions are relied upon too heavily by courts,[2] or that as social conditions change their rationality will diminish. However, the present case does not present a factual basis for considering these questions in a constitutional setting. Furthermore, this Court should be hesitant to review state court decisions on a constitutional issue that was not raised in the state courts below.[3] For all of the above reasons the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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[2] Note that Scott does not, as the petitioner asserts (Petition at 10), sharply criticize the marital presumption itself, but only the undue weight given it by some courts. See Scott, *Trusts* (3d ed. 1967), § 442, p. 3036, quoted in Petition at 12-13.

[3] The petitioner's assertions that the questions raised here were raised below (Petition at 7-9) are incorrect. The Petition for Rehearing and Application for Leave to Obtain Further Review filed in the state courts (Petition at 22a-24a) argued that this Court's decision in *Kahn* v. *Shevin*, 416 U.S. 351 (1974), *required* a resulting trust presumption when a wife purchases property in the name of her husband despite a gift presumption when a husband purchases property in the name of his wife. This novel constitutional argument was far different from that raised here, that the marital gift presumption is irrational when applied to either the husband or the wife.